182 (4) (5)

Nos. 10-929/10-931/10-932

Supreme Court, U.S.
FILED
FEB 22 2011
OFFICE OF THE CLERK

In The
Supreme Court of the United States

DENNIS DAUGAARD,
GOVERNOR OF SOUTH DAKOTA, *et al.*,
Petitioners,

v.

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

SOUTHERN MISSOURI RECYCLING AND
WASTE MANAGEMENT DISTRICT,
Petitioner,

v.

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

PAM HEIN, STATE'S ATTORNEY OF
CHARLES MIX COUNTY, SOUTH DAKOTA, *et al.*,
Petitioners,

v.

YANKTON SIOUX TRIBE AND
UNITED STATES OF AMERICA,
Respondents.

On Petitions For Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

BRIEF OF RANDALL COMMUNITY WATER DISTRICT, *AMICUS CURIAE*, IN SUPPORT OF PETITIONS FOR WRIT OF CERTIORARI

BRADLEY D KERNER
KERNER LAW OFFICE
PO Box 371
Armour, SD 57313
Telephone: 605-724-2313
Email: kernerlaw@unitelsd com
Attorney for amicus curiae
Randall Community
Water District

COCKLE LAW BRIEF PRINTING CO (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	1
ARGUMENT	4
CONCLUSION	9

TABLE OF AUTHORITIES

Page

CASES:

DeCoteau v. District County Court, 420 U.S. 425 (1975) 6, 7, 8

Hagen v. Utah, 510 U.S. 399 (1994) 8

Minnesota v. Mille Lacs Band of Chippewa Indians, 526 U.S. 172 (1999) 6, 7

Rosebud Sioux Tribe v. Kneip, 430 U.S. 584 (1977) 8

Solem v. Bartlett, 465 U.S. 463 (1984) 8

South Dakota v. Yankton Sioux Tribe, 522 U.S. 329 (1998) 4, 7, 8

Yankton Sioux Tribe v. Gaffey, 188 F.3d 1010 (8th Cir. 1999), cert. denied, 530 U.S. 1261 (2000) 6

STATUTORY REFERENCES:

South Dakota Codified Laws § 46A-9 (SDCL) 1, 3

MISCELLANEOUS AUTHORITIES:

Transcript of Oral Argument at 37, 38, 39, *Yankton Sioux Tribe*, 522 U.S. 329 (1998) (No. 96-1581) 5

United States Department of Agriculture Form RD 400-8 (Compliance Review) dated April 1, 2010 2

INTEREST OF *AMICUS CURIAE*[1]

In October 1976, the Randall Community Water District was incorporated under the laws of the State of South Dakota. South Dakota Codified Laws § 46A-9 (SDCL). The stated purpose of the Randall Community Water District was to pump, treat, and distribute potable water to rural customers and rural communities in several South Dakota counties. To date, the Randall Community Water District includes all of Charles Mix County and all of Douglas County, as well as portions of Aurora County, Bon Homme County, Brule County and Hutchinson County, all in central and southeastern South Dakota.

The local communities that are served in these counties include Armour, Aurora-Brule Rural Water System Inc., Corsica, Davison Rural Water System Inc., Delmont, Geddes, Lake Andes, Pickstown, Platte and Wagner. Native Americans live throughout this area and have individual accounts, as well as bulk users' accounts, with the Randall Community Water District.

In 2010, the total sales for the Randall Community Water District was 955,000,000 gallons. Native

---

[1] The parties were notified ten days prior to the due date of this brief of the intention to file. Written consent of all parties accompanies this brief. No counsel for a party authored any part of this brief No counsel or party made a monetary contribution intended to fund the preparation or submission of this brief Only the identified *amicus curiae* made monetary contributions and funded the preparation and submission of this brief.

American individuals (180 individual accounts) and Native American bulk users (5 bulk users' accounts) purchased a total of 59,000,000 gallons.[2] In all, this is approximately six percent of the total sales of the Randall Community Water District.

To serve the total area, Randall Community Water District has 1,766 miles of pipeline. The 2010 compliance review required by the United States Department of Agriculture confirms that the total population served in the area is 13,119 individuals, with a total Indian population of 2,679 individuals. Approximately 240 miles of pipeline are within the contested area. United States Department of Agriculture Form RD 400-8 (Compliance Review) dated April 1, 2010.

1. The future of the Randall Community Water District is tied to dependable revenue sources to cover the cost of production and related expenses. Rates are established and that rate is maintained for all accounts served. In addition, rates need to be increased periodically as costs increase. Again, these increases apply to all accounts served, including tribal and individual Indian accounts.

Jurisdiction within the limits of an Indian reservation is extremely complicated. To date, Randall Community Water District has not been substantially

---

[2] These bulk users include Greenwood, Marty, North Wagner Housing, Ft Randall Casino and Yankton Sioux Tribe Truck Plaza

impacted by tribal jurisdiction or the absence of state jurisdiction because the area has not been considered to be within the limits of an Indian reservation by state law. The decision of the court of appeals recognizes a sizable noncontiguous Indian reservation in this area consisting of all trust lands and arguably including hundreds of thousands of acres of fee lands. That recognition poses a real problem for the stability of this Water District.

2. The Randall Community Water District is entirely dependent on statutorily conferred powers. For example, the Water District operates within right-of-way easements. The entire process involved in right-of-way easements will be impacted by the court of appeals decision, placing reservation boundaries around all trust lands and an unknown amount of additional fee lands.

Because the decision of the court of appeals recognizes an Indian reservation that was purportedly established by Congress years ago, the effect of that reservation status on existing easements is unknown. Moreover, reservation status will affect the process for future easements needed for service and growth in the Randall Community Water District.

3. Similarly, powers of eminent domain set forth in SDCL 46-9-51 will be impacted by reservation status. Competing claims in this area of the law are unclear within Indian reservations.

4. The regulatory claims of tribal governments are also enhanced by the decision of the court of appeals.

The Randall Community Water District shares the concern noted in the *amicus curiae* Brief of Charles Mix County Electric Association, Inc. and Rosebud Electric Cooperative, Inc. in Support of the Petitions for Writ of Certiorari in this case. As the excerpts in the tribal code in Appendix A of that *amicus curiae* brief attest, similar regulatory claims in the Yankton area tied to reservation status will present an almost insurmountable problem for entities like the Randall Community Water District.

ARGUMENT

The Randall Community Water District would submit that expertise in Indian law is not needed to see what is wrong in this litigation. That is, namely, the failure of the lower courts to give proper weight to the almost "insurmountable presumption of disestablishment" previously established by the Court that should have controlled this case from the beginning. The first time, the district court resurrected 1858 reservation boundaries long deemed disestablished. The second time, the district court still recognized 1858 reservation boundaries despite the opinion of this Court in *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329 (1998). The third time, the district court parlayed a one thousand acre reservation mistakenly recognized by the court of appeals into a new 37,000 acre reservation, again contrary to the presumption set forth in *Yankton Sioux Tribe*, 522 U.S. at 344-345.

Neither the lower courts nor the parties should have been free to slight the disestablishment presumption.

As Charles Mix County noted in the County's Petition, it bears repeating that in oral argument, this Court *stressed* the controlling nature of this presumption.

> Tribe: The cession and the sum certain language . . . it's just *boilerplate* . . .
>
> Court: But this Court has said it's nearly *irrebuttable*.
>
> Court: That's what *Solem* said.
>
> Tribe: No . . . I say the presumption is that the Indians *retain* the reservation and it's up to the State to rebut
>
> Court: But then you must, mustn't you, if you're taking that position, say, "Court, you were wrong; you should qualify or even overturn your precedent" . . .
>
> Court: If we're faced with something . . . almost irrebuttable . . . why does the part that's uncertain dominate what we have said is a *very strong presumption*?

Transcript of Oral Argument at 37, 38, 39, *Yankton Sioux Tribe*, 522 U.S. 329 (1998) (No. 96-1581) (emphasis added).

This strong presumption of disestablishment constitutes the rule of law in this case and every

other case like it. That is the function of a presumption. The failure of the lower courts to properly deal with this presumption is worthy of the attention of this Court.

Instead of relying primarily on the presumption of disestablishment and text of the agreement, the court of appeals used "context" as its source of treaty interpretation, *Yankton Sioux Tribe v. Gaffey*, 188 F.3d 1010, 1020 (8th Cir. 1999), cert. denied, 530 U.S. 1261 (2000). Relying on the divided opinion of this Court in *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172 (1999), dealing with general treaty language, the court of appeals ignored *DeCoteau v. District County Court*, 420 U.S. 425 (1975), and the presumption of disestablishment recognized since *DeCoteau*, and found that "similar treaty language does not necessarily have the same effect when dealing with separate agreements." *Gaffey*, 188 F.3d at 1020. In fact, to the court of appeals the "cession and sum certain" language meant virtually nothing, as did the near *identity* of the agreements, not to mention the presumption. The court of appeals, in practical terms, regarded the Yankton Agreement as a blank slate to be filled in with whatever evidence of historical "context" it determined to be persuasive. There are several reasons why the approach of the court of appeals is fundamentally impermissible and fundamentally incorrect.

First, *Mille Lacs* is simply not applicable. *Mille Lacs* addresses an argument that claimed that when

general treaty language had been used in a 1901 agreement with a tribe on the west coast and had been interpreted in a certain way, it must have the same meaning as "similar" language in an agreement a half century earlier in Wisconsin, despite other facts to the conrary. That is *Mille Lacs*.

In this case, this Court has unanimously and unambiguously interpreted the meaning of the "cession" and "sum certain" language, first in *DeCoteau* and then in the case of the Yankton Agreement itself. *Yankton Sioux Tribe*, 522 U.S. at 344. Regardless of how *Mille Lacs* might be interpreted in a context in which this Court has not already ruled on the meaning of general treaty language, *Mille Lacs* has no application in a situation in which the Court has ruled on the meaning of language of the very agreement at issue. The approach of the court of appeals makes the emphatic language of this Court in *Yankton Sioux Tribe* mere *obiter dictum*, surely an egregiously erroneous use of *Mille Lacs*.

Second, the "cession and sum certain" language does, in fact, have a well established meaning in Indian law, unlike the more general language construed in *Mille Lacs*. This Court has emphasized its importance when finding disestablishment, as in *DeCoteau v. District County Court*, 420 U.S. at 445, and has emphasized its absence when declining to find disestablishment. This Court found an agreement lacking "cession and sum certain" to "stand in sharp contrast to the explicit language of cession employed in the Lake Traverse and the 1904 Rosebud

Acts." *Solem v. Bartlett*, 465 U.S. 463, 473 (1984). *See also, Hagen v. Utah*, 510 U.S. 399, 411-412 (1994).

Third, the appropriate mode of construction of the Yankton Agreement has already been set by this Court. *Yankton Sioux Tribe* indicated that although Congressional intent was perceptible from the "plain statutory language" it would also take "note of the contemporary historical context, subsequent congressional administrative references to the reservation and demographic trends." *Yankton Sioux Tribe*, 522 U.S. at 351. Thus, *Yankton Sioux Tribe* stands as an insurmountable barrier to discarding the meaning of the "plain statutory language." Rather, the language has primacy and the additional factors can be examined in addition to the language.

It has been twelve years since the decision of this Court in *Yankton Sioux Tribe*. At one point, the federal district court did not schedule a hearing for four years. No other case decided by this Court has required a process like this to decide whether an area is inside an Indian reservation. *See DeCoteau v. District County Court*, 420 U.S. 425 (1975) and *Rosebud Sioux Tribe v. Kneip*, 430 U.S. 584 (1977). The nearly irrebuttable presumption of disestablishment should have effectively precluded the bizarre nature of the litigation in this case.

CONCLUSION

For the foregoing reasons, and those stated in the Petitions of the State of South Dakota, Charles Mix County and Southern Missouri Recycling and Waste Management District, the Petitions for Writ of Certiorari should be granted.

Dated this 22nd day of February, 2011.

Respectfully submitted,

BRADLEY D. KERNER
KERNER LAW OFFICE
PO Box 371
Armour, South Dakota 57313
Telephone: 605-724-2313
Email: kernerlaw@unitelsd.com
Attorney for amicus curiae
Randall Community
Water District